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No. 2734

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIDEON M. FREEMAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

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Filed this.....day of August, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Case.

April 20, 1915, an indictment was presented under Section 215 of the Criminal Code, against Gideon M. Freeman, in *five* counts, charging in the *first* count, that Dr. Gideon M. Freeman, alias Paul Allen, doing business at 986 Market Street, San Francisco, under the name of Dr. Jordan, L. J. Jordan Co. and Jordan Museum of Anatomy, a corporation organized under the laws of California,

on or about May 15, 1912, under the guise and name of said Jordan's Museum of Anatomy, *devised a* certain *scheme* or artifice *to defraud, or for obtaining money* or property *by means* of certain *false pretenses, representations or promise* to be *effected by means of the postoffice* establishment of the United States, as follows:

That Dr. Gideon M. Freeman, alias Allen, *should place* or cause to be placed *advertisements in newspapers* of general circulation *published* in the United States, or in letters, booklets or other prints, setting forth in substance or effect that said Dr. Jordan was a physician practicing in San Francisco, and specially qualified to treat private diseases of men, among other diseases, syphilis, gonorrhea and diseases and affections arising therefrom, lost vitality; bladder, kidney, prostate and urinary diseases, and had cured numerous persons afflicted with said diseases, and *by means of said advertisements,* letters, booklets and other prints *he,* said Dr. Gideon M. Freeman, alias Paul Allen, then and there *intended to cause or induce* John Bammer, J. P. Millspaugh, George R. Alberts, Anson Ashford and John Caroway, and divers other persons whose names are unknown, and the public generally, to communicate and open correspondence with Dr. Jordan by means of the postoffice, relative to their real or supposed ailments; that when said persons should communicate with him, Dr. Jordan, whom the defendant knew was not a doctor or person existing in life, *by the means aforesaid,* that said

Dr. Jordan should write or communicate with such persons by means of letters placed in the postoffice, in substance and effect stating, with intent to defraud such persons irrespective of symptoms, and even where they indicated health rather than disease, etc.

That said Dr. Gideon M. Freeman on July 2, 1912, at San Francisco, for the purpose of executing said scheme or artifice, or in attempting so to do, unlawfully, feloniously, knowingly and willfully, placed or caused to be placed in the postoffice, to be delivered thereby, a certain letter upon which postage had been prepaid, addressed to John Bammer, Colusa, California, a copy of said letter being as follows, to wit, (setting out the letter) (Tr. 5-8).

The other *four* counts are identical with the *first,* except that the *letter* set out is different, the date of mailing is different, and the person to whom the letter was mailed is different; in the *first* count the letter was mailed to *John Bammer,* in the *second* count to *J. P. Millspaugh,* in the *third* count to *George R. Alberts,* in the *fourth* count to *Anson Ashford,* and in the *fifth* count to *John Caroway* (Tr. 6-29).

Reasons for Rehearing.

The plaintiff in error respectfully prays the Court to grant him a *rehearing* of the above-entitled cause, upon the following grounds:

First. That there was absolutely no proof of the *scheme* or the material element of the scheme to defraud charged in the indictment, in this: that the indictment expressly charges the material element of the scheme to defraud to be that plaintiff in error

> "should place or cause to be placed *advertisements* in certain newspapers of general circulation published within the United States, or in letters, booklets or other prints, wherein it should be set forth * * * *and by means of said advertisements* * * * he then and there intended to cause or induce (the five fictitious persons) * * * to communicate and open correspondence with Dr. Jordan, by means of the postoffice; that *when* said persons should communicate with him, Dr. Jordan, * * * that *he,* the said Dr. Gideon M. Freeman * * * should write or communicate with said persons by means of letters placed in the postoffice" (Tr. 3-4).

There is *no proof* in the record that the plaintiff in error "placed or caused to be placed" *advertisements* in any newspapers, or in letters, booklets or other prints, as alleged in the indictment, wherein were set forth the things alleged in the indictment.

This Court in its consideration of the case on the writ of error *overlooked this point* made in his brief by plaintiff in error, and omitted to make any ruling thereon.

In the case of Goldman v. U. S., 220 Federal 57, 59-62, cited by the Court, in its opinion, the scheme to defraud was by an advertisement in the Cleveland Tribune, and asked for replies *by letter* through the

postoffice, and Goldman took these letters from the postoffice.

Unless the scheme to defraud which the indictment charges against the defendant has been proved, it is our belief that this Court would not feel justified in sustaining the conviction.

The bill of exceptions "contains *all* of the evidence of any and every character given, and all proceedings had upon the entire trial of this case" (Tr. 283).

The plaintiff in error should be granted the opportunity to present and have this essential point in his case considered and decided by the Court.

Second. The United States Inspectors initiated and solicited the letters set forth in the indictment, and the deposit in the postoffice of *these letters* so solicited and initiated constitute the crime charged in the indictment; and when *the only acts* done by the plaintiff in error are charged to constitute the crime for which he was convicted and sentenced, and that in the doing of these acts so solicited and initiated it is charged that the offense had its origin in his mind, and the Government Inspectors *suggested to him the doing of these acts by him,* then, we respectfully submit, *the offense* had its origin in the minds of the Government Inspectors, and exactly as lucidly stated by Judge Gilbert in Woo Wai v. U. S. 223 Fed. 414, 415:

> "Woo Wai and his associates, therefore, *although they were not aware of the fact,* were engaged in an act *which was not to result* in an accomplished offense against the laws of the United States."

So, in this case, paraphrasing the decision in the Woo Wai case:

> "Dr Freeman, in depositing these letters in the postoffice, although he was not aware of the fact, was engaged in an act which was not to result in an accomplished offense against the United States."

And why, when these letters were deposited in the postoffice, was Dr. Freeman engaged in an act which was not to result in an accomplished offense against the United States? Because the Government Inspectors were conducting a test correspondence, under the names of fictitious persons, to ascertain whether the plaintiff in error, who was suspected by the Government of being engaged in a scheme to defraud, was engaged in such a scheme or not.

It is not only admitted, but proved by the Government, that the *five letters* set forth in the indictment, for the alleged *depositing* of which *in the postoffice* the plaintiff in error is charged with a violation of Section 215 of the Criminal Code, were initiated, requested and solicited to be by him *deposited* in the postoffice, by the Government Inspectors; and if the deposit of these letters, so solicited, etc., be an offense, conclusively then, *that*

offense had its origin, not in his mind, but in the minds of the Government Inspectors.

The case is, we respectfully submit, identically the same as, and should be ruled by the decisions of this Court in the cases of Woo Wai v. U. S., 223 Fed. 414, and Sam Yick v. U. S., 240 U. S. 60.

The case of Grimm v. U. S., 156 U. S. 604, was upon a statute of the United States which made criminal the *mere deposit* in the postoffice *of letters* giving information of a certain kind.

In the case of Goldman v. U. S., 220 Fed. 57, on page 62, the Court said that the writer of *one* of the letters was *not* in the employ of the Government.

We respectfully submit, that as the acts charged in this indictment to have been done by Dr. Freeman, were initiated and solicited by the Government Inspectors, and not only would not but could not have been done by Dr. Freeman had not the Government Inspectors initiated and solicited the doing of the acts charged in the indictment, that the writing and mailing of these letters set forth in the indictment did not and could not constitute an offense against the United States; and that every possible element that must exist in order to constitute the crime charged in the indictment is absent from the proof in this case.

Third. In concluding our brief we made the point, which has escaped the attention of the Court,

because it was involved with our request for remission of the jail sentence, that this Court should take *judicial notice* that Dr. Freeman, the plaintiff in error, did not commit the crime charged. Paul Oesting was indicted for *the* offense of depositing *these identical letters* in the postoffice, in an indictment literally the same as that in this case, substituting his name in place of Dr. Freeman's name; he pleaded guilty, was sentenced, sued out a writ of error from this Court, and this Court *affirmed* that sentence in Oesting v. United States, 234 Fed. 304. The transcript in this Court is No. 2712 (brief of plaintiff in error, p. 44).

We therefore submit that the records of this Court establish that Paul Oesting, and not Dr. Freeman, deposited these letters in the postoffice; and that the plaintiff in error is not, therefore, guilty of the crime charged against him.

We respectfully pray the Court to grant the plaintiff in error a rehearing in the above-entitled cause.

Dated, San Francisco,
August 15, 1917.

KNIGHT & HEGGERTY,
CHARLES J. HEGGERTY,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CHARLES J. HEGGERTY,
Of Counsel for Plaintiff in Error and Petitioner.